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CITATIONS

674391—62——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. ——

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

J. B. MONTGOMERY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App. A, *infra*, pp. 15–27) is reported at 206 F. Supp. 455. The report of the Interstate Commerce Commission (App. C. *infra*, pp. 29–41) is printed at 83 M.C.C. 457.[1]

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398, 2284, and 2321–2325, to set aside an order of the

[1] The report of Division 1 of the Commission involved two applications: MC–72273, Modification of Permit, and MC–72273 (Sub-No. 3), Conversion Application. Only the Commission's order in the latter (the Sub-No. 3) proceeding is involved in this appeal. The entire Commission denied petitions for reconsideration on May 17, 1961.

Interstate Commerce Commission. The judgment of the three-judge district court (App. B, *infra*, p. 28) was entered on July 10, 1962, and notices of appeal were filed in that court on September 7, 1962, by the United States and the Interstate Commerce Commission. The district court extended the time to docket the case in this Court to February 4, 1963.

The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *American Trucking Associations, Inc., et al.* v. *Frisco Transportation Co.*, 358 U.S. 133; *American Trucking Associations, Inc., et al.* v. *United States, et al.*, 364 U.S. 1.

STATUTE INVOLVED

Section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15)), as amended August 22, 1957, 71 Stat. 411, provides:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Prior to the 1957 amendment, Section 203(a)(15) (49 U.S.C. (1952 ed.) 303(a)(15)) was as follows:

> The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) of this section and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

Section 204 (b) of the Interstate Commerce Act (54 Stat. 922) provides:

> The Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term "common carrier by motor vehicle", or "contract carrier by motor vehicle", as the special nature of the services performed by such carriers or brokers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this chapter, to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest.

Section 212(c) of the Interstate Commerce Act (49 U.S.C. 312(c), as amended August 22, 1957, 71 Stat. 411), provides:

> The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and

> hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

QUESTION PRESENTED

Whether the Interstate Commerce Commission, in converting a contract carrier permit of a motor carrier to a common carrier certificate under the "grandfather" provision of Section 212(c) of the Interstate Commerce Act, may restrict the carrier to serving facilities of particular types of business, in order to insure substantial parity between the carrier's new authority and its authority under the prior permit.

STATEMENT

Prior to 1957 the appellee ("Montgomery") was the holder of a contract carrier permit authorizing extensive operations. The permit (App. D, *infra*) did not specify the particular commodities which the carrier could transport, but defined its operating authority in terms of commodities usually dealt in or used by particular types of businesses. Thus, the permit authorized Montgomery to transport (App. D, *infra*, pp. 43-44):

(1) Such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, equipment, materials and supplies used in the conduct of such businesses.

(2) Such commodities as are usually dealt in, or used by, meat, fruit, and vegetable packing houses.

(3) Such commodities, as are usually dealt in, or used by, wholesale and retail department stores.

Although the permit authorized Montgomery to serve a broad geographical area, it could transport only under contracts with persons operating the foregoing classes of businesses. The purpose of this type of authority was to allow the contract carrier to perform virtually all the motor transportation needs of the shippers whose businesses it served.

In 1957 Congress, concerned that under this Court's decision in *United States* v. *Contract Steel Carriers*, 350 U.S. 409, contract carriers would be able to serve a large number of customers, amended the definition of contract carrier in Section 203(a)(15) to impose stricter standards upon the authorized operations of such carriers.[1] At the same time, it added Section 212(c), which provides for the revocation of the contract carrier permit of, and the issuance of a common carrier certificate to, any permit holder whose operations on the effective date of the Act (August 22, 1957) did not conform to the amended definition of ~~common~~ contract carriage. The subsection further provides:

[1] See S. Rep. No. 703, 85th Cong., 1st Sess., p. 7.

> Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

In January 1958 the Commission instituted a proceeding under Section 212(c) to determine whether the appellee's contract carrier permit should be revoked and a common carrier certificate issued in its place. The appellee subsequently filed an application for conversion of its permit to a certificate, and various carriers intervened in opposition to the conversion.

After full administrative proceedings, the Commission (Division 1) held that appellee's operations did not conform to the amended definition of a contract carrier, revoked its permit, and issued to it a common carrier certificate. The certificate, like the permit, described the commodities to be carried in terms of products customarily dealt in or used by various specified types of businesses, such as packinghouses and department stores. In order to enable the carrier "to furnish substantially the same service as a common carrier as it is now authorized to provide as a contract carrier thereby insuring substantial parity between the permit and certificate authority," the Commission determined to restrict the carrier's authority "to movements from, to, or between outlets or other facilities of particular businesses of the class of shippers with whom it may now contract" (App. C, *infra*, p. 38). More specifically, the certificate limits the carrier to providing service on such commodities "to shipments moving, from, to, or between wholesale and

retail" outlets or stores (App. E., *infra*, pp. 47–48).[1]

The appellee filed suit in the district court to set aside the Commission's order insofar as it limited operating authority to movements from, to or between facilities of particular types of businesses. The district court held that the Commission "was without statutory authority to impose the restrictions in question," set the Commission's order aside, and remanded for further proceedings (App. A., *infra*, pp. 26–27). In the court's view, the Commission has no authority "to impose restrictions to accomplish 'substantial parity' between past and future operations" (*id.*, p. 26).

THE QUESTION IS SUBSTANTIAL

This appeal presents a substantial question of statutory interpretation involving the authority of the Interstate Commerce Commission under the 1957 amendments to the Interstate Commerce Act. In that Act Congress, because of concern over the inroads that contract carriers had been making into the business of common carriers, amended the definition of contract carrier to impose stricter standards upon the permissible activities of such carriers. At the same time, it provided that existing contract carriers whose activities did not meet the new statutory defini-

[1] The Commission also imposed a prohibition against the combination of appellee's various operating rights in order to render a through service (a practice known in the industry as "tacking") (App. C, *infra*, p. 38). That restriction was not challenged in the district court. The Commission rejected the proposal of the intervenors that restrictions should be imposed upon the appellee's right to "interchange of traffic with other common carriers" (*id.*, pp. 37–38).

tion could convert their permits into common-carrier certificates under a grandfather provision which entitled them, without any showing of public convenience and necessity, to a certificate authorizing "the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit." Congress intended by this provision to grant the new common carriers substantially the same operating authority they previously had had as contract carriers. The question in this case is whether these statutory provisions authorize the Commission, in the case of a contract carrier whose commodity authority is defined not in terms of specified commodities but in terms of products customarily handled by particular types of businesses, to impose limitations upon the business facilities to be served which are designed to achieve "substantial parity" between the carrier's operations under its old permit and its new certificate.

1. The question is important in the administration of the Act. A substantial number of contract-carrier permits define the commodities to be carried in terms of products customarily handled by particular types of businesses. Indeed, such a definition may be essential to give a carrier authority to provide complete transportation service for someone who handles a large variety of products. If the Commission cannot impose, upon the conversion of such permits to certificates, limitations designed to insure that the new authority does not permit substantially broader operations than the old, the effect of the statutory conversion of the operating authority from contract to

common carriage could be a vast expansion of the permissible scope of authorized operations.

For example, in the present case the appellee's old permit authorized it to carry commodities customarily dealt in by wholesale and retail hardware and automobile accessory businesses, by meat, fruit and vegetable packing houses, and by wholesale and retail department stores, or commodities used by either of the latter two categories. This authority is broad enough to authorize the transportation of such major items as petroleum products, coal, building materials, groceries, refrigeration equipment, motor vehicles, office, kitchen, and restaurant furniture and equipment, and stationery and office supplies. Under the old permits, however, Montgomery was only authorized to transport this broad range of products for persons operating the designated categories of businesses. The new certificate attempted to preserve this restriction by limiting Montgomery's common-carrier operations to shipments from, to, or between wholesale and retail outlets or stores. Without such a restriction, the effect of the conversion from contract carrier permit to common carrier certificate would be to permit the carrier "to enlarge and expand the business beyond the pattern which it had acquired prior to [August 22, 1957]" (*Noble* v. *United States*, 319 U.S. 88, 92).

There have been at least sixty-five conversion proceedings under Section 212(c) in which the certificates issued in place of the permits contain provisions similar to those involved in this case. All of the Commission orders imposing such limitations are still

subject to judicial review, there being no explicit limitation period on the institution of proceedings for review of Commission orders. In addition, there are two other pending court cases involving the same issue.[4] Plainly, this is an important statutory question which has a significant impact upon the motor-carrier industry, and which warrants plenary review by this Court.

2. The district court held that "the Commission was without statutory authority to impose the restrictions in question," and it stated that "[a]ny adverse effect upon the industry resulting from the lack of authority of the Commission to impose restrictions to accomplish 'substantial parity' between past and future operations is a matter for consideration by the Congress and is not a justification for this court to write into the congressional legislation something which is neither evident from the language of the Act nor from the legislative history" (App. A, *infra*, p. 26). We submit that, to the contrary, the Commission does have statutory authority to impose such restrictions, and that such authority is supported not only by the language and legislative history of the Act, but by the decisions of this Court interpreting the earlier "grandfather" provisions of the Motor Carrier Act.

a. Section 212(c) provides that a certificate issued to a former contract carrier in conversion proceedings

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[4] *Zuzich Truck Line, Inc.* v. *United States and Interstate Commerce Commission*, Civ. Action No. KC-1640, U.S.D.C., Kansas, which was [redacted] on August 30, 1962, and *Fischbach Trucking Company, et al.* v. *United States and Interstate Commerce Commission, et al.*, Civil Action No. 37218, U.S.D.C., N.D. Ohio, E. Div., in which briefs have been filed and which is awaiting argument.

"shall authorize the transportation * * * of the same commodities between the same points or within the same territory as authorized in the permit." As the District Court for the District of New Jersey recently pointed out, "[t]he purpose of the limitation contained in that proviso is obviously to maintain substantial parity with the operating authority contained in [the carrier's] contract carrier permits, and is in accord with the legislative intent implicit in section 212(c) of the Act * * *." *Tar Asphalt Trucking Co., Inc.* v. *United States*, 208 F. Supp. 611, 614, pending on jurisdictional statement, No. 762, this Term; see also the subsequent statement of that court in *P. Saldutti & Son, Inc.* v. *United States*, 210 F. Supp. 307, 314, that "[u]nder Section 212(c) of the Act, a converted carrier is entitled to receive at the hands of the Commission a certificate that maintains parity with the operating authority contained in its contract carrier permit." The statutory design of Section 212(c) thus adopted the plan of the original "grandfather" clause of the Motor Carrier Act, which provided for "substantial parity between future operations and prior *bona fide* operations" (*Alton Railroad Co.* v. *United States*, 315 U.S. 15, 22; see *Nelson, Inc.* v. *United States*, 355 U.S. 554, 561).

Section 212(c) provides that the certificate shall authorize the transportation "of the same commodities * * * as authorized in the permit." This Court has recognized that "the business of the contract carrier" may sometimes have to be defined "in terms of the type or class of shippers served" in order to achieve the substantial parity between past and future

operations which the original "grandfather" clause contemplated. *Noble* v. *United States*, 319 U.S. 88, 92. In the present case, Montgomery's permit limited the commodities to be carried not only to products customarily dealt in or used by particular businesses, but also to products actually used by persons engaged in such business. The provision in the certificate limiting the transportation of such products to shipments "from, to, or between" such businesses—designed to achieve the substantial parity between contract and common carriage which the Act contemplates—may properly be viewed and upheld as an authorization "of the same commodities * * * as authorized in the permit."

The restriction may also be viewed as an exercise of the Commission's power under Section 204(b). That Section authorizes the Commission to establish just and reasonable classifications of groups of carriers, and such just and reasonable requirements for carriers so classified as the Commission deems necessary or desirable in the public interest. In Section 212(c) Congress itself classified a group of carriers, that is, it singled out contract carriers whose operations do not meet the new definition and provided for their conversion to common carriers. In imposing restrictions upon such converted carriers intended to insure substantial parity between their old and new operations, the Commission established a requirement which it deemed necessary or desirable in the public interest.

While the legislative history does not throw much light on the precise issue, it does indicate that the

basic purpose of Congress was to permit existing contract carriers whose activities did not meet the new definition to continue their existing operations as a common carrier. See S. Rep. No. 703, 85th Cong., 1st Sess.; Note, 107 U. of Pa. L. Rev. 1150. There is certainly nothing in the legislative history which indicates that Congress intended that the conversion of permits to certificates would confer upon the carriers the windfall to their operating authorities which the decision of the district court in this case would permit.

b. The district court held, however, that the limitation which the Commission imposed upon Montgomery's operating authority was really a territorial restriction, and that Section 212(c), unlike the original grandfather clause, does not authorize the Commission "to specify territory" or to "impose territorial restrictions beyond those contained in the permit" (App. A, *infra*, p. 24). There are several answers to this argument. *First*, as shown above, while the limitation unquestionably has territorial effects, it may properly be viewed as a specification of the commodities to be carried. *Second*, Section 212(c) authorizes the certificate to limit operations to "the same points" or "the same territory" as provided in the permit. By limiting Montgomery to contracts with persons operating specified types of businesses, the permit did in effect limit the points and territories which Montgomery could serve. The limitation in the certificate, designed to restrict Montgomery to substantially the same activities as those previously performed, may therefore be viewed as a specification of "the same

points" and "the same territory" which it served as a contract carrier. *Third,* in view of the Congressional purpose of achieving substantial parity of contract and common carrier operations, it is not unreasonable to read into Section 212(c) by implication the specific authority which Section 208(a) gives the Commission, in the issuance of certificates under the original grandfather provision, to "specify the service to be rendered and the * * * territory within which, the motor carrier is authorized to operate * * *."

CONCLUSION

This appeal presents a substantial question of statutory interpretation which warrants plenary consideration by this Court. Probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

ROBERT B. HUMMEL,
ELLIOTT H. MOYER,
ARTHUR J. MURPHY, JR.,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
BETTY JO CHRISTIAN,
Attorney,
Interstate Commerce Commission.

FEBRUARY, 1963.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 7384

J. B. MONTGOMERY, INC., PLAINTIFF,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

Before BREITENSTEIN, Circuit Judge, ARRAJ and CHILSON, District Judges.

CHILSON, District Judge.

MEMORANDUM OPINION AND ORDER

This is an appeal from a decision of the Interstate Commerce Commission, herein referred to as the "Commission".

After the filing of the complaint herein, J. B. Montgomery, Inc., an Iowa corporation, succeeded to the interests of the original plaintiff, J. B. Montgomery, Inc., a Nebraska corporation, and the former has been substituted as plaintiff herein. Both will be referred to herein as "Montgomery."

The controversy centers around certain restrictions placed by the Commission in a certificate of public convenience and necessity issued to Montgomery in 1961.

The events leading to the dispute are as follows:

Montgomery was issued a permit under the "grandfather" provisions of the 1935 Motor Carriers Act,

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Section 209(a) [49 U.S.C. Section 309(a)],[1] to operate as a "contract carrier" by motor vehicle. The permit authorized Montgomery to transport under individual contracts or agreements with certain classes of shippers certain commodities from certain designated geographical areas to other geographical areas, without restriction as to the actual points of pickup and delivery within the areas specified.

Prior to 1957, a "contract carrier" was defined by Section 203(a)(15) [49 U.S.C. Section 303(a)(15)] as follows:

> The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

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[1] The pertinent parts of Section 309(a)(1) are:

"Except as otherwise provided in this section and in section 310a (regarding temporary authority) of this title no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 310 of this title, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such permit, without further proceedings if application for such permit was made to the Commission as provided in subsection (b) of this section and within one hundred and twenty days after October 1, 1935, * * *."

In 1957, the foregoing section was amended to read:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

To protect the interests of those "contract carriers" who held existing permits but who did not fall within the amended definition of "contract carrier", Congress, in the 1957 amendments, enacted Section 212(c), which provides:

> The Commission shall examine each outstanding permit and may within one hundred and eighty days after August 22, 1957, institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on August 22, 1957, do not conform with the definition of a contract carrier in section 303(a)(15) of this title as in force on and after August 22, 1957; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or

within the same territory as authorized in the permit.

To make certain that no carrier would escape Commission regulation with respect to its interstate operations, there was also included in the 1957 amendment Section 203(c) [49 U.S.C. Section 303(c)] which provides:

> * * * no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation * * *.

In January, 1958, the Commission instituted a proceeding under Section 212(c) to determine if Montgomery's permit should be revoked and a certificate of public convenience and necessity issued in lieu thereof. Montgomery filed a petition affirmatively seeking conversion of its permit to a certificate.

After hearings, the Commission concluded that Montgomery's operations were no longer those of a "contract carrier" but were those of a "common carrier", were otherwise lawful, ordered Montgomery's permit revoked and authorized the issuance to Montgomery of a certificate of public convenience and necessity.

The certificate authorized Montgomery to transport, as a "common carrier", the same commodities to and from the same geographical areas as set forth in the permit, but as to three of the authorities the certificate restricted the points of pickup and delivery "to shipments moving from, to, or between wholesale

and retail" outlets or stores.[2] These restrictions did not appear in the permit.

The Commission determined the restrictions were necessary to prevent an enlargement of the scope of operations under the certificate as compared with past operations under the permit. Or to put it another

[2] A comparison between the wording of the permit and the certificate as to one of the three questioned authorities will serve to illustrate the differences between the permit and the certificate.

AUTHORITY UNDER PERMIT:

"3. And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail establishments, the business of which is the sale of meat, fruit, and vegetable packinghouse products: *Such commodities* as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses, between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U.S. Highway 87 and on and north of U.S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line."

AUTHORITY UNDER THE CERTIFICATE:

"*Such Commodities* as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses,

"Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points in Kansas, Nebraska, Iowa, that part of Colorado on the east of U.S. Highway 87 and on and north of U.S. Highway 50, and that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line.

"RESTRICTION: The authority granted immediately above is restricted to shipments moving from, to, or between wholesale and retail outlets, the business of which is the sale of meat, fruits, and vegetable packinghouse products."

way, the Commission determined the restrictions were necessary to assure "substantial parity" between future operations under the certificate and past operations under the permit.

By this action Montgomery questions the Commission's authority to impose these restrictions.

The applicable principles of law are:

(1) Administrative determinations must have a basis in law and must be within the granted authority, and it is a judicial function and not an administrative function to determine the limits of the statutory power. *Social Security Board* v. *Nierotko*, 327 U.S. 358.

(2) Orders of an administrative agency may not be set aside, modified or disturbed if they are within the scope of the Commission's statutory authority and are based upon adequate findings, which in turn are supported by substantial evidence. *United States* v. *Pierce Auto Freight Lines* 327 U.S. 515; *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125.

(3) There is a presumption that the Commission has properly performed its official duties, and this presumption supports its acts in the absence of clear evidence to the contrary. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503; *Baltimore and Ohio RR.* v. *United States*, 298 U.S. 349.

Montgomery asserts the restrictions are beyond the scope of the Commission's statutory authority.

Montgomery contends that the last sentence of Section 212(c), which reads:

> Such certificate so issued shall authorize the transportation as a common carrier of the *same* commodities between the *same* points or within the *same* territory as *authorized in the permit*. (Emphasis added).

is mandatory and allows the Commission no discretion or power to impose territorial restrictions not contained in the permit; that the legislative history discloses no intent on the part of Congress to authorize such territorial restrictions, but on the contrary, the legislative history indicates it was the intent of Congress that there should be no restriction of any rights held under the permit.

The Commission asserts the following statutory authority:

(1) Section 208(a) of the Motor Carriers Act [49 U.S.C. Section 308(a)] relating to issuance of both "grandfather" and new certificates provides that the Commission may specify "the services to be rendered and the routes over which * * * or the territory within which the motor carrier is authorized to operate" and this is statutory authority for the imposition of the restrictions here in question.

(2) The "grandfather" provisions of the Motor Carrier Act, Section 206(a)(1) [49 U.S.C. Section 306(a)(1)], authorize the Commission to assure "substantial parity" between future operations and prior bona fide operations; that Section 212(c) is in the nature of a "grandfather" provision, and therefore, the Commission has the same power to accomplish "substantial parity" under Section 212(c) as it has under Section 206(a)(1).

(3) There is nothing in 212(c) or its legislative history expressing a congressional intent to limit the Commission's power to impose territorial restrictions in certificates issued to converted carriers and the Commission's authority is implicit in the Act.

(4) The imposition of territorial restrictions preserving "substantial parity" is responsive to the intent of Congress expressed in the National Transportation Policy's injunction that the act be adminis-

tered to the end of developing and preserving an adequate, efficient and economical transportation system.

In short, the Commission construes Section 212(c) to authorize the imposition of such limitations as the Commission determines will accomplish "substantial parity" between Montgomery's previous operations as a permit carrier and its future operations under the certificate.

We will discuss the Commission's contentions in order.

Section 208(a) [49 U.S.C. Section 308(a)] reads in part as follows:

> Any certificate issued under section 306 (grandfather provisions) or 307 (new certificates) * * * shall specify the service to be rendered and the routes over which * * * the territory within which the motor carrier is authorized to operate.

Under this provision and Section 206(a) [49 U.S.C. Section 306(a)] (grandfather provisions) the delineation of the area and specification of localities which may be served has been entrusted by the Congress to the Commission. *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475 at 480.

But the statutory authority provided by Section 208(a) to delineate the area of service is specifically limited to certificates issued under sections 306 or 307. The certificate in question here was issued under Section 212(c), which contains no such statutory authority. In fact, Section 212(c) specifically states that the Commission *"shall* authorize the transportation of the *same* commodities between the *same* points or within the *same* territory *as authorized in the permit."* (Emphasis added.) In view of this specific mandate of the Congress, we are unable to read into

Section 212(c) the powers of delineation and specification of territory which are contained in Section 208(a).

Nor do the "grandfather" provisions of the Motor Carrier Act, Section 206(a)(1) [49 U.S.C. Section 306(a)(1)], authorize the Commission to impose the restrictions here in question.

The Supreme Court has held that the Commission is empowered to impose territorial limitations on a certificate issued under the "grandfather" provisions to assure "substantial parity" between future operations and prior bona fide operations. *Alton R.R.* v. *United States,* 315 U.S. 475; *United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 480. However, the authority for this power is derived from express delegations of power by the Congress. Section 208 [49 U.S.C. Section 308] provides:

> Any certificate issued under section 306 (grandfather provisions) * * * shall specify the service to be rendered * * * the territory within which the motor carrier is authorized to operate.

Section 306 referred to above, (Section 206(a) [49 U.S.C. Section 306(a)]) (grandfather provisions), provides that the issuance of a certificate under the grandfather provisions is dependent upon the bona fides of previous operations to be determined by the Commission. It was these two provisions of the Act, (Section 206(a), 49 U.S.C. 306(a) and Section 208 (a), 49 U.S.C. 308(a)), to which the Supreme Court pointed in *United States* v. *Carolina Carriers Corp.,* 315 U.S. 475, when the Court stated:

> The precise delineation of the area or the specification of localities which may be served has been entrusted by Congress to the Commission.

Section 212(c) neither authorizes the Commission to specify territory nor determine bona fides of prior operations.

The last sentence of Section 212(c) expressly states that the certificate shall authorize transportation "of the *same* commodities between the *same* points * * * *as authorized in the permit.*" (Emphasis added.) This is tantamount to saying that the Commission shall not impose territorial restrictions beyond those contained in the permit.

There is nothing in the legislative history cited by the Commission indicating a contrary congressional intent. On the other hand, there is some support in the legislative history for this construction. During the hearings upon the bill before a Subcommittee of the Senate Interstate and Foreign Commerce Committee, the following exchange took place between Mr. Barton, transportation counsel for the Committee, and Mr. Clarke, then chairman of the Interstate Commerce Commission:

> Mr. BARTON. * * *
>
> Mr. Clarke, do you think there is any constitutional difficulty in changing, as we say, as you propose, a contract carrier to a common-carrier status?
>
> Mr. CLARKE. No, I can see none. *It isn't taking away from them anything that they have;* it isn't disturbing any property rights of the contract carrier. *It is giving him greater opportunity.* He can still serve his contract shippers, but through the conversion provisions of the bill *he would also have the opportunity to serve the general public as well as the obligation.* (Emphasis added.) (P. 35 Hearings—Surface Transportation—Scope of Authority of Interstate Commerce Commission, 85th Cong. 1st Session.)

The fact that Congress has expressed an intention that the Act be administered to the end of developing and preserving an adequate, efficient and economical transportation system, does not give to the Commission unlimited authority to proceed in any manner which the Commission believes will accomplish these objectives. The Commission, in accomplishing the objectives, must proceed within the limit of its statutory authority and we find no such authority to impose the restrictions in question.

The Commission points out that the conversion of the permit to a certificate eliminates the permit restrictions which confined Montgomery's service to those which it served under individual contracts or agreements, and under the certificate Montgomery is now at liberty to serve any members of the public dealing in the commodities authorized for transportation by the certificate. The Commission indicates, that in the absence of restrictions to assure "substantial parity", the scope of the operations of Montgomery and other converted carriers under certificates may be greatly expanded as contrasted with their past operations under permits, and that such enlarged operations will have an adverse effect upon the industry.

This enlargement in the scope of operations of converted carriers was recognized in the legislative history which we have previously quoted. Mr. Clarke, the chairman of the Interstate Commerce Commission, stated that the conversion from a permit to a certificate not only didn't take away anything from the carrier, but gave him a greater opportunity. "He can still serve his contract shippers, but through the conversion provisions of the bill he would also have the opportunity to serve the general public as well as the obligation." (Hearings, supra.) There is nothing in the Act or its legislative history indicat-

ing that Congress intended to restrict this enlargement of operations by the test of "substantial parity" or otherwise.

Any adverse effect upon the industry resulting from the lack of authority of the Commission to impose restrictions to accomplish "substantial parity" between past and future operations is a matter for consideration by the Congress and is not a justification for this court to write into the congressional legislation something which is neither evident from the language of the Act nor from the legislative history.

The Commission also complains of Montgomery's failure to produce any evidence to demonstrate that it had in the past ever performed any services which could not be continued under the territorial limitations imposed by the Commission. The Commission states:

> In the absence of such evidence, the Commission was justified in concluding that such territorial limitations would enable it to furnish substantially the same service as a common carrier as it is now authorized to provide as a contract carrier, thereby insuring substantial parity between the permit and certificate authority.

Having held that a certificate to be issued under Section 212(c) is not subject to the test of "substantial parity" and there being no other issue raised, such as abandonment or dormancy, to which evidence of previous operations would be material, Montgomery was under no compulsion to offer evidence concerning his previous operations.

We hold that the Commission was without statutory authority to impose the restrictions in question.

The order of the Commission is set aside and the matter is remanded for further action by the Com-

mission in accordance with the views herein expressed.

This opinion sufficiently states the findings of fact and conclusions of law of the court. Further findings of fact and conclusions of law are not necessary.

The Clerk will enter an appropriate judgment.

DATED at Denver, Colorado, this 6th day of July, A. D. 1962.

BY THE COURT:

JEAN S. BREITENSTEIN
Jean S. Breitenstein, Circuit Judge
Tenth Circuit Court of Appeals

ALFRED A. ARRAJ
Alfred A. Arraj, Chief Judge
United States District Court

HATFIELD CHILSON
Hatfield Chilson, Judge
United States District Court

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 7384

J. B. MONTGOMERY, INC., PLAINTIFF

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

ORDER REMANDING FOR FURTHER ACTION

THIS CAUSE came before this statutory court and pursuant to the Memorandum Opinion filed herein, it is

ORDERED that the Order of the Interstate Commerce Commission of September 16, 1960, and the Order of May 17, 1961, in its Docket No. MC-72272 (Sub. No. 3) be set aside and the matter remanded for further action by the Commission in accordance with the views expressed in the Memorandum Opinion of this Court.

DATED at Denver, Colorado, this tenth day of July, 1962.

BY THE COURT:

JEAN S. BREITENSTEIN
Jean S. Breitenstein, Circuit Judge
Tenth Circuit Court of Appeals

ALFRED A. ARRAJ
Alfred A. Arraj, Chief Judge
United States District Court

HATFIELD CHILSON
Hatfield Chilson, Judge
United States District Court

APPENDIX C

M-10190

INTERSTATE COMMERCE COMMISSION

No. MC-72273 [1]

J. B. MONTGOMERY, INC., MODIFICATION OF PERMIT

Decided September 16, 1960

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1. In No. MC-72273, petitioner, as successor in interest, found entitled to additional authority by reason of predecessor's operations conducted on July 1, 1935, and continuously since that time.
2. In No. MC-72273 (Sub-No. 3), operations of applicant found to be those of a common carrier by motor vehicle, and applicant found to be entitled to a certificate of public convenience and necessity authorizing operation, as a common carrier by motor vehicle, of the commodities, and from, to, or between the points or territories authorized by its presently held permit. Issuance of a certificate in lieu of presently held permit approved upon compliance by applicant with certain conditions, and application in all other respects denied. Proceeding instituted herein, on our own motion; discontinued.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GOFF, AND HERRING

BY DIVISION 1:

These proceedings were heard separately, but were the subject of a single report and recommended order

[1] This report also embraces No. MC-72273 (Sub-No. 3), J. B. Montgomery, Inc., Conversion Application.

of an examiner. They concern related matters and will be disposed of here in a single report. Exceptions to the orders recommended by the examiner in both proceedings were filed by certain protestants, and J. B. Montgomery, Inc., hereinafter called Montgomery, petitioner in the title proceeding and applicant in the subtitled proceeding, replied. Our conclusions differ somewhat from those recommended.

In No. MC–72273, hereinafter called the "grandfather" proceeding, by petition filed November 20, 1957, Montgomery, of Denver, Colo., seeks to have the proceeding in which its permit, No. MC–72273, which is reproduced in appendix A hereto, was issued to its predecessor in interest, reopened and its permit modified to authorize the transportation which, it is claimed, Montgomery and its predecessor have performed for the Gates Rubber Company, hereinafter called Gates, of Denver, Colo., prior to and since July 1, 1935. At the hearing, Montgomery, through its president, indicated that it desired modification of the permit so as to include, in addition to the authority now embraced in its permit, the authority set forth in appendix B hereto. Numerous motor carriers [2] oppose the petition.

In No. MC–72273 (Sub-No. 3), hereinafter called the conversion proceeding, by order of January 3, 1958, division 1, upon its own initiative, instituted a proceeding under section 212(c) of the Interstate

[2] Illinois-California Express, Inc., Interstate Motor Lines, Inc., Denver-Chicago Trucking Company, Inc., Ringsby Truck Lines, Inc., Navajo Freight Lines, Inc., Watson Bros. Transportation Co., Inc., Centennial Truck Lines, Inc., and Buckingham Transportation, Inc., in its own behalf and as operator of Des Moines Transportation, Inc., hereinafter called I.C.X., Interstate, Denver-Chicago, Ringsby, Navajo, Watson, Centennial, and Buckingham respectively.

Commerce Act to determine whether Montgomery's outstanding permit, authorizing the operations described in appendix A, should be revoked and a certificate of public convenience and necessity issued in lieu thereof. The order instituting the proceeding names Montgomery as respondent. Thereafter, on February 18, 1958, Montgomery also filed an application for conversion under section 212(c). We will dispose of the conversion matter on the basis of the application filed by Montgomery. All of the protestants in the "grandfather" proceeding and Pacific Intermountain Express Co., hereinafter called P.I.E., oppose the conversion.

In the "grandfather" proceeding the examiner recommended that permit No. MC–72273 should be modified to include the transportation, over irregular routes of (1) such commodities as are usually dealt in by manufacturers of rubber and rubber products, from Denver to Chicago, Ill., and Omaha, Nebr., and (2) materials, equipment, and supplies used by manufacturers of rubber and rubber products, from Chicago, and points in Illinois within 100 miles of Chicago, to Denver. Watson, on separate exceptions and I.C.X., Interstate, Denver-Chicago, Ringsby, and Navajo, on joint exceptions, contend generally that the evidence of Montgomery's witnesses, unsupported by written documents, is not the best evidence; that there were some inconsistencies in the testimony; and that Montgomery has delayed for an unnecessarily long time in taking any action to modify its authority. I.C.X., Interstate, Denver-Chicago, Ringsby, and Navajo also contend that the examiner erred in refusing to receive certain letters in evidence; and if any authority is granted it should only authorize service between Denver and Chicago restricted to pickup or delivery at the site of the Gates plant at Denver. In

reply Montgomery contends that the evidence presented on its behalf is reliable and consistent, and that the findings of the examiner are fully supported by the evidence.

In the conversion proceeding the examiner found that Montgomery's operations on August 22, 1957, did not conform to the definition of a contract carrier as set forth in section 203(a)(15), as amended; and that such operations were those of a common carrier by motor vehicle and were otherwise lawful. He recommended that an appropriate certificate, in lieu of the permit now held by Montgomery, be issued with the so-called Keystone restrictions omitted therefrom. On exceptions all those opposing the conversion, with the exception of Centennial, contend, collectively or individually, that the examiner erred (1) in failing to impose restrictions against interchange and tacking, (2) in eliminating existing Keystone restrictions, and (3) in failing to consider the issue of dormancy. In addition certain protestants contend that Montgomery did not meet the burden of proving that it was a common carrier; and that the operations of Montgomery and its predecessor were not "otherwise lawful" as required by section 212(c). Montgomery replies that its operations do not conform to the definition of a contract carrier, that they are those of a common carrier, and are otherwise lawful; and that no restrictions should be imposed in the certificate to be issued.

The evidence adduced, the examiner's recommendations, the exceptions, and the replies thereto have been considered. We find that the material facts are correctly stated in the examiner's report, and we adopt such statement, as hereinafter supplemented, as our own.

THE "GRANDFATHER" PROCEEDING

The considered permit stems from a "grandfather" application filed on February 10, 1936, by Montgomery's predecessor, Joseph Burton Montgomery, doing business as Montgomery Transfer. Following informal field investigations and the issuance of so-called compliance orders, a permit was issued to petitioner on August 31, 1943, authorizing it to conduct the operations which are described in appendix A hereto. Montgomery claims that its predecessor also transported, during the "grandfather" period, the commodities, in the manner, and to and from the points described in appendix B, and that its predecessor and it have been so operating since that time under the impression that such movements were authorized by the permit in issue.

The record contains a deposition of the predecessor, and oral testimony of Montgomery's president, two witnesses representing Gates, an insurance broker, two former drivers of Montgomery and its predecessor, a driver who drove for a competitor of the predecessor, and a former traffic manager of one of the predecessor's shippers.

The predecessor commenced motor-carrier operations in 1932, and when the business was incorporated on or about 1938 he became president and principal stockholder until 1945 when he retired. He recalls transporting, prior to July 1, 1935, shipments of tires and other rubber goods from Denver to Chicago for Gates, and some westbound transportation of general supplies used in the manufacturing of tires from Chicago to Denver for the same company under an oral agreement. He often drove one of his own trucks. From July 1, 1935, until his retirement he continued to perform services for Gates. He kept a limited bookkeeping system, but the records of his operation

have been destroyed. Montgomery's president, son of the predecessor, has been associated with it since 1946, and has been president since 1949. He testified that, to his personal knowledge and recollection, Montgomery has provided transportation for Gates since 1946.

The vice president for traffic of Gates, employed by Gates since 1912, has used the predecessor's and Montgomery's service for the transportation of tires and other rubber goods from the Gates plant at Denver to Chicago and Omaha from before 1935 to the present time. Also both Montgomery and its predecessor have transported machinery and supplies for Gates since prior to 1935, from Chicago and from unspecified points within 100 miles of Chicago to Denver. The sales manager of Gates' warehouse at Chicago from 1929 to August 1936, knew the predecessor in this period and remembers Montgomery's trucks performing a transportation service inbound to the Chicago warehouse from Denver. One former truck-driver of the predecessor recollects transporting shipments for Gates in 1937 from Denver and also loading tires at the Gates plant, and another truck-driver, who drove for Montgomery and its predecessor from 1936 to 1942, recalls handling loads for Gates continuously during that period. A former competitor of the predecessor in 1932 and 1933 often saw the trucks of the predecessor at the Gates plant in Denver. An insurance agent commenced writing insurance for the predecessor on January 15, 1935, covering shipments of tires from Denver to Chicago. A former traffic manager for Armour and Company at its Denver plant from 1931 to 1944 first knew the predecessor in 1932, personally assisted him in drawing up the original written contract with Gates in 1936, and recalls that the predecessor transported tires for Gates.

We are of the opinion, despite the fact that much of the evidence concerns incidents occurring over 20 years ago, that the record is convincing that Montgomery or its predecessor was engaged in the operations as set forth in paragraph 5 of appendix C on and prior to July 1, 1935, and have been so engaged continuously since. We do not agree that in the circumstances here present the oral testimony pertaining to the considered operations is insufficient to warrant the relief sought. Although the records pertaining to the services conducted on and before the effective date have been destroyed, we cannot see any compelling reason why the predecessor should have retained them. We believe that the nine witnesses testifying on behalf of petitioner gave a total picture of petitioner's operations before, on, and since July 1, 1935, and we conclude that they were qualified to testify concerning the facts with respect to the considered operations. See *Beatty Motor Exp., Inc.—Modification of Permit*, 71 M.C.C. 307. Some of the protestants also argue that the examiner erred in not allowing certain letters to be admitted into evidence. However, protestants' petition to admit these letters was denied by order of July 28, 1958, and we see no reason for granting the relief here sought and there denied.

One other matter requires a brief comment. Some of the protestants argue that the authority granted should be limited to service between Denver and Chicago restricted to pickup or delivery at the site of the Gates plant at Denver. However, we believe that the evidence is convincing that other points beside Denver and Chicago were served by Montgomery and its predecessor. We also see no justification for restricting the services concerned from and to the Gates plant at Denver. We believe that

the modified authority would not have been so restricted if included in the original permit issued pursuant to the determination of the "grandfather" application, and see no compelling reason to do so now. We therefore conclude that Montgomery's present authority should be modified to the extent recommended by the examiner, to include the authority as indicated in paragraph 5 of appendix C.

THE CONVERSION PROCEEDING

Montgomery's operations between July 1 and August 31, 1957, were substantially as authorized under its outstanding permit; during this period it had effective continuing contracts with 12 different shippers. The contract with Gates was considered by Mongomery to be within its authority to perform service under contracts with persons who operate wholesale or retail department stores. Montgomery operates numerous units of equipment, none of which is assigned for the exclusive use of any shipper. Its services do not appear designed to meet the distinct need of any particular customer, and subject only to shipper acceptance of its charges, its service is available to any member of the shipping public having shipments moving within the scope of its authority. Certain of Montgomery's authorities, as indicated in appendix A, contain Keystone restrictions limiting service to shippers of a certain class.

We are of the opinion that, testing applicant's operations by the amended definition of a contract carrier as set forth in section 203(a)(15), it fairly appears that they do not meet the criteria contained in the amended definition and do not conform thereto. We do not agree with some of the protestants who argue that conversion should not be authorized, because applicant did not prove "operations" on August

22, 1957. "Operations" clearly contemplates the overall business of, and service rendered by, the contract carrier on the critical date, and not the mere physical operations performed on that single day. In the light of the facts of record, including the nature of the commodities described in applicant's permit, its holding out to the public generally, its method of operation, and the number of persons it serves, it is clear that its operations were, on August 22, 1957, that of a common and not a contract carrier.

There remains for consideration the questions whether there should be conversion of portions of applicant's operating authority that are dormant; whether restrictions against interchange and tacking should be imposed; and whether the certificate issued herein should eliminate so-called Keystone restrictions. In *T. T. Brooks Trucking Co., Inc., Conversion Application,* 81 M.C.C. 561, hereinafter called the *Brooks* case, the Commission concluded that where only portions of a carrier's operating authority are dormant, the determination of the carrier's status should be made from a consideration of its overall activities and conversion authorized where such operations are found to be those of a common carrier. Since Montgomery's overall operations actually conducted on August 22, 1957, entitle it to conversion, the certificate issued herein will authorize the performance of the transportation service authorized by the permit outstanding on that date.

In the *Brooks* case it was also concluded that restrictions against interchange of traffic should not be imposed in certificates granted to converted carriers in section 212(c) proceedings. The right of interchange was there held to be a privilege stemming from and incidental to a converted carrier's new common-carrier status and not a result of a restatement

of the operating authority previously held as a contract carrier. Accordingly, no restriction against interchange of traffic with other common carriers will be imposed in the grant of authority herein. It was found, however, in the *Brooks* case that where the possibility of tacking separately stated operating rights exists, restrictions against such joinder should be imposed in all certificates issued pursuant to section 212(c) proceedings. Under the circumstances, and in view of tacking possibilities in Montgomery's permit, a restriction against such joinder will be imposed in the grant of authority herein.

The *Brooks* case also held that in instances where Keystone restrictions appear in the permits of carriers who are to be converted, the certificates to be issued in lieu thereof should contain terms which will continue, to some extent, at least, the effectiveness of such restrictions. It is considered inappropriate, however, to confine Montgomery's service to establishments of "persons" who operate particular businesses. Rather, its service will be restricted to movements from, to, or between outlets or other facilities of particular businesses of the class of shippers with whom it may now contract as indicated in appendix C herein. This will enable it to furnish substantially the same service as a common carrier as it is now authorized to provide as a contract carrier thereby insuring substantial parity between the permit and certificate authority.

One other matter deserves our attention. Certain protestants argue on exceptions that since Montgomery and its predecessor have transported products for Gates, without specific authority, that this precludes a finding that its operations have been "otherwise lawful" as required for conversion by section 212(c). In view of our finding herein in the "grand-

father" proceeding that Montgomery is entitled to authority to conduct such operations under the "grandfather" provisions of the Transportation Act of 1935, a finding that such operations conducted since that time were lawful appears to be justified.

FINDINGS

In No. MC–72273, we find that on and continuously since July 1, 1935, Joseph Burton Montgomery, doing business as Montgomery Transfer, was, and that he and his successor J. B. Montgomery, Inc., have been, engaged continuously since, in bona fide operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, of the commodities and from and to the points, and in the manner set out in paragraph 5, of appendix C hereto; that by reason thereof J. B. Montgomery, Inc., is entitled to an amended permit authorizing continuance of such operations in addition to those heretofore authorized; that, in the light of the finding herein in No. MC–72273 (Sub-No. 3), that J. B. Montgomery, Inc., is entitled to a certificate of public convenience and necessity in lieu of its outstanding permit, and the provision therein for the issuance of such a certificate, no amended permit need be issued; and that in all other respects the application should be denied.

In No. 72273 (Sub-No. 3), we find that the operations of applicant on August 22, 1957, did not and presently do not conform with the definition of a contract carrier set forth in section 203(a)(15) of the Interstate Commerce Act; that such operations are those of a common carrier by motor vehicle and are otherwise lawful; that by reason thereof applicant is entitled to a certificate of public convenience and necessity authorizing operation, as a common carrier by motor vehicle, in interstate or foreign commerce,

of the commodities and from and to the points or territories authorized in its presently held permit, as modified herein in No. MC–72273, as set forth in appendix C hereto, provided, however, that the certificate issued to applicant shall be subject to the condition that the separate authorities contained therein shall not be tacked or joined, directly or indirectly, for the purpose of performing any through service; that an appropriate certificate authorizing such operations should be granted concurrently with the revocation of the permit now held by applicant as described in appendix A hereto; and that, except to the extent granted herein, the authority sought in this conversion proceeding should be denied.

Upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the act and with our rules and regulations thereunder, an appropriate certificate will be issued.

An order will be entered denying the authority sought except to the extent granted herein.

COMMISSIONER MURPHY, dissenting in part:

I would deny the petition for modification in the "grandfather" proceeding and limit the conversion to the operations embraced in applicant's presently held permit. While the general oral testimony indicates rather convincingly that petitioner has performed some transportation for the manufacturer of rubber products, it is significant that although petitioner indicated that records were available back to 1942, no documentary evidence in respect of any specific shipments handled for this shipper at any time since the "grandfather" date was submitted. In my opinion, the unsupported general allegations clearly are insufficient to support a finding of continuous bona fide transportation for about 25 years of the additional commodities from and to the points and

areas set forth in appendix B of the report. Moreover, I consider petitioner's contention that it has been transporting rubber products and other items for Gates under the belief that such service was embraced in its authority to transport "such commodities as are usually dealt in, or used by, wholesale and retail department stores," to be completely untenable.

APPENDIX D

PERMIT

No. MC 72273

J. B. MONTGOMERY, INC., COZAD, NEBRASKA

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D.C., on the 31st day of August A.D. 1943

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Permit, subject, however, to such terms, conditions, and limitations as are now or may hereafter be attached to the exercise of the privileges herein granted, to engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce, under special and individual contracts or agreements for the transportation of the commodities indicated and in the manner specified below;

IRREGULAR ROUTES:

Dried beans.

From points and places in Colorado on and east of U.S. Highway 87 and on and north of U.S. Highway 50, to Des Moines, Iowa, and points and places in Illinois north of a line extending from a point on the Missouri-Illinois State line directly

west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line, with no transportation for compensation on return except as otherwise authorized.

And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail hardware or automobile-accessory establishments, the business of which is the sale of hardware and automobile accessories:

Such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials,* and *supplies* used in the conduct of such businesses,

From Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morrill, and North Platte, Nebr., with no transportation for compensation on return, except as otherwise authorized.

And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail establishments, the business of which is the sale of meat, fruit, and vegetable packing house products:

Such commodities are usually dealt in, or used by, meat, fruit, and vegetable packing houses,

Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points and places in Kansas, Nebraska, and Iowa those in Colorado on and east of U. S. Highway 87 and on and north of U. S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of

Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

And under such contracts or agreements with persons (as defined in section 203(a) of the Interstate Commerce Act) who operate wholesale or retail department stores, the business of which is the sale of general merchandise:

Such commodities as are usually dealt in, or used by, wholesale and retail department stores,

Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other points and places in Kansas, Nebraska, and Iowa, those in Colorado on and east of U.S. Highway 87 and on and north of U.S. Highway 50, and those in Illinois north of a line extending from a point on the Missouri-Illinois State line directly west of Springfield, Ill., through Springfield, to the Illinois-Indiana State line.

And It Is Further Ordered, That this permit shall be effective from the date hereof and shall remain in effect until suspended, changed, or revoked, as provided in said Act.

By the Commission, division 5.

W. P. Bartel,
Secretary.

(SEAL)

APPENDIX E

Service Date September 21, 1961

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY C–15.3

NO. MC 123639 SUB 2*

J. B. MONTGOMERY, INC.,
DENVER, COLORADO

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the 21st day of September, A.D., 1961

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and

* Proceeding was instituted under Section 212(c) of the Act, in No. MC 72273 (Sub 3) for conversion of respondent's contract carrier authority to common carrier authority. Pursuant to the report of the Commission decided September 16, 1960, common carrier operations were authorized, and No. MC 123639 Sub 2 has been assigned thereto.

limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuant of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

AND IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

IRREGULAR ROUTES:

Dried beans,

From points in that part of Colorado on and east of U.S. Highway 87 and on and north of U.S. Highway 50, to Des Moines, Iowa, and points in that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line, with no transportation for compensation on return except as otherwise authorized.

Such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, *equipment, materials and supplies* used in the conduct of such businesses,

From Chicago, Ill., to Sterling, Fort Morgan, Yuma, Loveland, and Colorado Springs, Colo., and Fremont, Hastings, Kearney, Superior, York, Sidney, Alliance, Scottsbluff, Beatrice, Gering, Morrill, and North Platte, Nebr., with

no transportation for compensation on return except as otherwise authorized.

RESTRICTION: The authority granted immediately above is restricted to shipments moving from, to, or between wholesale and retail outlets of hardware or automobile accessory establishments.

Such commodities as are usually dealt in, or used by, meat, fruit, and vegetable packinghouses,

Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points in Kansas, Nebraska, Iowa, that part of Colorado on and east of U.S. Highway 87 and on and north of U.S. Highway 50, and that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line.

RESTRICTION: The authority granted immediately above is restricted to shipments moving from, to, or between wholesale and retail outlets, the business of which is the sale of meat, fruits, and vegetable packinghouse products.

Such commodities, as are usually dealt in, or used by, wholesale and retail department stores,

Between Denver, Colo., and Chicago and Blue Island, Ill., on the one hand, and, on the other, points in Kansas, Nebraska, Iowa, that part of Colorado on and east of U.S. Highway 87 and on and north of U.S. Highway 50, and that part of Illinois north of a line beginning at the Illinois-Missouri State line from a point directly west of Springfield, Ill., and extending through Springfield to the Illinois-Indiana State line.

RESTRICTION: The authority granted immediately above is restricted to shipments moving, from, to, or between wholesale or retail department stores.

Such commodities as are usually dealt in by manufacturers of rubber and rubber products,

From Denver, Colo., to Chicago, Ill., and Omaha, Nebr., with no transportation for compensation on return except as otherwise authorized.

Materials, equipment and supplies used by manufacturers of rubber and rubber products,

From Chicago, Ill., and points in Illinois within 100 miles of Chicago, Ill., to Denver, Colo., with no transportation for compensation on return except as otherwise authorized.

RESTRICTION: The separate authorities contained herein shall not be tacked or joined, directly or indirectly, for the purpose of performing any through service.

By the Commission, division 1.

HAROLD D. MCCOY,

(SEAL) Secretary.

U.S. GOVERNMENT PRINTING OFFICE: 1963